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September 25, 2015

Donna Lieberman  
Executive Director  
New York Civil Liberties Union  
125 Broad Street, 19<sup>th</sup> floor  
New York, New York 10004

Dear Ms. Lieberman:

On July 13, 2015, New York Civil Liberties Union ("NYCLU") submitted an application to the Joint Commission on Public Ethics ("Commission") for an exemption from the Source of Funding Disclosure requirements contained in Legislative Law Article 1-A §§1-h(c)(4), 1-j(c)(4) and 19 NYCRR Part 938. The statute provides that whether to grant an exemption is a discretionary determination of the Commission. The Commission considered NYCLU's application at its August 4, 2015 meeting. The Commissioners reviewed the application and supporting evidence prior to the meeting and evaluated the application under the relevant legal standard during the public session. NYCLU's application for exemption failed to receive a vote of the majority of the Commissioners, therefore, the application was denied. Pursuant to Part 938.5(d), the Commission hereby sets forth the reasons and basis for the denial.

By way of background, the Public Integrity Reform Act of 2011 ("PIRA") (Chapter 399, Laws of 2011) amended Legislative Law Article 1-A by enacting strict disclosure requirements that, through increased transparency, better inform the public about efforts to influence governmental decision-making. The source of funding disclosure provisions of the law require lobbyists who lobby on their own behalf and clients of lobbyists, who devote substantial resources to lobbying activity in New York State, to make publicly available each source of funding exceeding \$5,000 for such lobbying. The purpose of these statutory provisions is to provide the public with information about those who seek to influence the government.

While under both the statute and the regulations entities are permitted to apply for exemptions from disclosure, NYCLU was required to show, by clear and convincing evidence, that its primary activities involve areas of public concern that create a substantial likelihood that disclosure of its source(s) of funding will cause harm, threats, harassment or reprisals to the source or

individuals or property affiliated with the Source. 19 NYCRR Part 938.4; *see* also Legislative Law §§1-h(c)(4), 1-j(c)(4). It should be noted that the Commission enacted these regulations to conform to legislative intent seeking the broadest interpretation in favor of disclosure. (19 NYCRR 938.1). NYCLU sought an exemption pursuant to Part 938.4(b), which is available for organizations that have exempt status under Section 501(c)(4) of the Internal Revenue Code of the United States.

Part 938.4 sets out a list of five nonexclusive factors the Commission will consider when determining whether an applicant has made a clear and convincing showing of substantial likelihood of harm, threats, harassment or reprisals to the applicant's source(s) of funding if disclosure were required. It is the Commission's view that unless an applicant makes a persuasive showing under multiple factors it is unlikely to prevail.

In reviewing NYCLU's application, the Commission finds that NYCLU has failed to make the requisite showing in support of its exemption request. NYCLU's application for exemption states that it is an organization whose primary mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. (NYCLU's Application for Exemption, pg. 2). While the Commission recognizes that NYCLU's primary activities involve areas of public concern (19 NYCRR Part 938.4(b)), the Commission finds that NYCLU seems to rely solely on that fact for its assertion that it is eligible for the exemption.

First, the Commission considered the number, recurrence and location of incidents identified in NYCLU's application. The Commission found that many of the incidents were remote in time and geography. Notably, NYCLU's application relies heavily on the information it proffered in its 2013 application for exemption. Accordingly, there is limited evidence of incidents in the last two years. While NYCLU's application claims to cover incidents spanning a fifteen-year period, little information is provided about the dates of specific incidents. For example, the fourth bullet on page 4 describes an incident involving five members of the NYCLU who became subject to "community hostility" after being identified, but based on footnote 9, this may have taken place in or before 1978. Further, at least three of the ten incidents mentioned in the application itself occurred well outside of the New York area.

Second, NYCLU's application has limited information related to supporters of NYCLU, the American Civil Liberties Union ("ACLU"), and similar organizations. Many supporters attend rallies or publicly identify themselves through social media or other venues, and NYCLU has been unable to adequately demonstrate that these supporters experience adverse effects from being associated with entities or causes similar to that of the NYCLU. For example, the NYCLU website calendar includes a Legislative Lobbying Day (May 5, 2015) and numerous public meetings and chapter events. (See <http://www.nyclu.org/event>.) The majority of the information contained in NYCLU's application pertains to its staff members or pertains generally to the ACLU. Thus NYCLU's application fails to establish a nexus between the information it offered in support of its application and the likelihood that supporters, donors, or sources of funding will experience harm, threats, harassment, or reprisals.

Third, some of the incidents described by NYCLU rise to no more than constitutionally protected speech as opposed to clear and convincing evidence of a substantial likelihood of harm, threats, harassment or reprisal if disclosure is required.

The burden is on the applicant to establish through “clear and convincing evidence” a “substantial likelihood of harm.” This high standard for an exemption is in keeping with the purpose, “....to better inform the public about efforts to influence governmental decision making through increased transparency.” (19 NYCRR Part 938.1(4)). To be eligible for the exemption NYCLU’s application must contain clear and convincing evidence, by way of specific instances/examples, that disclosure of source(s) of funding would create a substantial likelihood of harm, threats, reprisal or harassment to the source(s) of funding or individuals or property affiliated with such source. The Commission has concluded that NYCLU failed to meet that burden. Therefore, NYCLU’s application for the exemption is denied.

Sincerely,

Commissioners

Hon. Joseph Covello

Marvin E. Jacob

Seymour Knox, IV

Gary J. Lavine

Hon. Mary Lou Rath

David A. Renzi

George H. Weissman